IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 41

THOMAS SCHWARTZ,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR THE STATE OF TEXAS, RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was charged by indictment (R. 2-4) and convicted of being an accomplice to the crime of robbery after a trial in Criminal District Court No. 2 of Dallas County, Texas. His punishment was assessed at ninety-nine years' confinement in the State Penitentiary (R. 12). Upon appeal to the Court of Criminal Appeals of Texas, the conviction was affirmed and a motion for rehearing overruled.[1]

The recordings of several telephone conversations to which petitioner was a party were used by the State in evidence at the trial. Petitioner urges that

[1] *Schwartz v. State*, 246 S. W. 2d 174 (Tex. Crim. 1952).

this constituted a violation of Section 605 of the Federal Communications Act, 48 Stat. 1103, 47 U.S.C.A. § 605, which forbids the divulgence of intercepted wire and radio communications without consent of the sender.[2]

It is respondent's position that the evidence in question was admitted in full compliance with both federal and state law. To be specific, the telephone messages were not "intercepted" as that term is used in Section 605 of the Federal Communications Act. The recordings were made with the knowledge and consent of one of the parties to the conversations. There was no trespass upon petitioner's property, and no wires were "tapped." But even assuming that an intercecption did in fact occur, the records were properly received in evidence since the Federal Communications Act does not regulate the admissibility of evidence in a state criminal trial.

STATEMENT OF THE CASE

The facts concerning the offense itself are described in detail in the opinion of the Court of Criminal Appeals.[3] Since they are of little importance to a determination of the issues presented here, a short summary for the convenience of the Court should suffice for the purposes of this brief.

Petitioner Thomas Schwartz, a Dallas, Texas pawnbroker, entered into a conspiracy with William Trent Jarrett and Lester Emmett Bennett, whereby they planned to commit a series of robberies and

[2] This provision is reproduced in the appendix, pages 29, 30.

[3] 246 S. W. 2d at pp. 175, 176. This portion of the opinion below may also be found R. 220-222.

equally divide the proceeds. Schwartz was to lay the plans, select the victims, and furnish Jarrett and Bennett with the necessary firearms and other equipment. Jarrett and Bennett, in turn, were to carry out the robberies and deliver the spoils to Schwartz for disposal.

This proceeding was instituted as a result of a robbery executed pursuant to their scheme. Jarrett and Bennett forcibly entered the Dallas residence of Dr. W. W. Shortal, tied up the maid and yardman, and at gunpoint they forced Mrs. Shortal to surrender her diamond rings and what money she had in her purse. Then they locked her in a second floor closet and left to deliver the jewelry to Schwartz.

Jarrett was apprehended by the police soon after the robbery, and subsequently he made a number of telephone calls to Schwartz from the Sheriff's office (R. 105). Twelve to fifteen of their conversations were recorded, and six were used by the State in evidence at Schwartz's trial (R. 212-215). Before the recordings were played for the jury, Jarrett testified as to what had been said over the telephone, and this tended to show that Schwartz was the motivating force behind the robbery (R. 121, 122). Schwartz, testifying in his own defense, admitted that he had had a series of telephone conversations with Jarrett and that he had suspected all along that they were being recorded. But he also said that he continued to talk to Jarrett only in the hope of obtaining knowledge of the whereabouts of Bennett, who at that time was still at large. The information thus obtained, he said, was passed on to

the police (R. 173, 174). In short, Jarrett's testimony was evidence of Schwartz's complicity in the crime, while Schwartz claimed that he was only attempting to aid the police. Thus there was drawn an issue of fact concerning the substance and purpose of the telephone conversations.

Therefore, the State on rebuttal introduced the recordings in order to corroborate Jarrett's story of the conspiracy. Without reference to the specific questions of law which must be decided here, these recordings were competent evidence to show exactly what was said, the tone of voice and manner of spech of the parties, and the general purpose of the conversations.[4] Jarrett's testimony was evidence that there had been certain telephone conversations between himself and Schwartz, and Schwartz, admitting that the conversations did take place, relied upon his version of what was said as a possible defense. One may not complain of the receipt in evidence of facts which he too introduces.[5] Both Schwartz and Jarrett admitted to having been parties to these conversations, and the recordings were used merely to settle the question of what had been said.

POINT ONE

The Federal Communications Act does not control the admissibility of evidence in a trial in a state court.

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[4] 2 Wigmore on Evidence (3rd ed) 789-791, §669; 7 Wigmore on Evidence (3rd ed) 616, §2155; 1 Wharton on Criminal Evidence (11th ed.), §379; 22 C.J.S. 983, Criminal Law, §644.

[5] *Soble v. Texas*, 153 Tex. Crim. 629, 218 S. W. 2d 195 (1949), cert. den. 338 U. S. 866.

ARGUMENT AND AUTHORITIES

For the purposes of argument under respondent's point one, it will be assumed that the evidence in question was obtained by means of tapping telephone wires, that an "interception" did in fact occur. Although Section 605 of the Federal Communications Act has been held to be a limitation upon the power of a federal court to admit or exclude evidence, there are compelling reasons why this doctrine should not be extended to affect the admissibility of evidence in a trial in a state court.

It has already been noted that the recorded telephone conversations were obtained without trespass upon petitioner's property. This being true, the instant proceeding comes within the decision of this Court in *Olmstead v. United States*, 277 U. S. 438 (1928), wherein it was held that the use of evidence obtained by means of tapping telephone wires in a criminal trial does not constitute an invasion of any of the rights extended to the accused by the Constitution of the United States, provided there is no trespass involved. In that case it was further held that a state statute making the interception of telephone messages a misdemeanor cannot affect the rules of evidence applicable in federal criminal cases. However, the Court added that "'Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in *federal* criminal trials, by direct legislation, and thus depart from the common law of evidence.'" (Emphasis supplied).

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[*] 277 U. S. at pp. 465, 466.

The rule of the *Olmstead* case remains in full force and effect today. This was made quite clear in a more recent decision, in which the Court made the following statement:

> "The petitioners ask us, if we are unable to distinguish *Olmstead v. United States*, to overrule it. This we are unwilling to do. That case was the subject of prolonged consideration by this Court. The views of the Court, and of the dissenting justices, were expressed clearly and at length. To rehearse and reappraise the arguments pro and con, and the conflicting views exhibited in the opinions, would serve no good purpose. Nothing now can be profitably added to what was there said. It suffices to say that we adhere to the opinion there expressed."[7]

Wire tapping is not an unlawful search and seizure within the scope of the Fourth Amendment to the Constitution, and petitioner does not contend that he has been deprived of any right guaranteed by the Fourteenth Amendment. Therefore, no constitutional question is presented here. If petitioner has any right to be protected, it arises from a statute and not from the Constitution. *Beard v. Sanford*, 110 F. 2d 527 (5th Cir. 1940), cert. den. 310 U. S. 635.

In 1934, Congress enacted the Federal Communications Act, of which Section 605 is important here. This provision renders it unlawful to divulge the contents of any intercepted telephone, telegraph, or radio communication without the consent of the sender. The Supreme Court of the United States has

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[7] *Goldman v. United States*, 316 U. S. 129, 135, 136 (1942).

ruled that the Act bars from federal criminal trials testimony or transcriptions of what was overheard by means of such an interception. However, the Court's first decision applied only to communications made in interstate commerce. *Nardone v. United States*, 302 U. S. 379 (1937). Next the Court held inadmissible not only direct evidence thus obtained, but also evidence indirectly traceable to the interception. *Nardone v. United States*, 308 U. S. 338 (1939). In another decision handed down about the same time, the doctrine was extended to include intrastate, as well as interstate, messages. *Weiss v. United States*, 308 U. S. 321 (1939). However, records of the intercepted messages may be used to induce persons to testify for the prosecution, and such testimony is admissible against one not a party to the conversations. The right thus created is purely personal and may be exercised only by the sender of the message. *Goldstein v. United States*, 316 U. S. 114 (1942).

Thus there has been a metamorphosis of the statute from a bar against wire tapping into a rule of evidence for federal courts.

The Act lays down no explicit mandate for the guidance of the courts with regard to the admission or exclusion of evidence obtained in this manner. It became a rule of evidence only by judicial implication, not by express provision. *And as a rule of evidence it has been held applicable to federal trials only.* Each one of the cases in which the Federal Communications Act was applied in this manner was instituted by federal prosecuting authorities and tried in a federal district court. The illegally obtained evidence was held to be inadmissible in federal courts

on the same theory applied by this Court in *Weeks v. United States*, 232 U. S. 383 (1914), as to evidence obtained by an unreasonable search and seizure. However, the rule of the *Weeks* case applies only to federal courts. It does not place any limitations upon the use of evidence in a state criminal proceeding. *Wolf v. Colorado*, 338 U. S. 25 (1949).

The recordings were perfectly admissible in evidence under Texas law. In *Welchek v. State*, 93 Tex. Crim. 271, 247 S. W. 574 (1923), the Texas Court of Criminal Appeals specifically rejected the doctrine of the *Weeks* case in holding that evidence obtained by an unreasonable search and seizure, in violation of the Texas Constitution, is admissible. That decision, however, was superseded by the enactment of Article 727a, Texas Code of Criminal Procedure (Vernon 1948), which now reads as follows:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

This statute formerly provided that evidence obtained in violation of the Constitution *or laws* of either the United States or Texas, was inadmissible in a Texas criminal trial.[8] It was amended, however,

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[8] Article 727a, before amendment to its present form read as follows:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

and now the only remaining federal restriction on the admissibility of evidence in Texas criminal proceedings is the question of whether it was obtained in violation of the Constitution of the United States. Thus the Texas courts are not bound in this respect by federal statutes.[9] There is no Texas statute or judicial precedent which forbids the admission of evidence of the kind complained of here.

No provision of the Constitution of the United States having been violated by the admissior of the evidence in question, the decision of the Court of Criminal Appeals in this respect is final. The manner in which a state court of last resort interprets the statutes of its own state, is not subject to review by this Court. The action of the state court is decisive of the issue so long as it does not result in the denial of any right protected by the Fourteenth Amendment. *Twining v. New Jersey*, 211 U. S. 78, 91 (1908); *Iowa Central Ry. v. Iowa*, 160 U. S. 389, 393, 394 (1896).

In *Wolf v. Colorado*, *supra*, this Court recently upheld the right of a state court to accept or reject evidence according to the laws of the individual state.[10] There the petitioner, a physician, was accused of participation in a conspiracy to commit abortion, in violation of a Colorado penal statute. Without first obtaining a search warrant, local peace officers entered his office and seized his professional records — clearly an unconstitutional search and

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[9] Cf. *Montalbano* v. State, 116 Tex. Crim. 242, 34 S. W. 2d 1100 (1931).

[10] See also *State v. Mara*, 96 N. H. 463, 78 A. 2d 922 (1951).

seizure.[11] These records were admitted in evidence at the trial, and this Court upheld the trial judge's action in allowing them to be used. Under the doctrine of the *Weeks* case, similar evidence would have been clearly inadmissible in a case tried in a federal court, but the mere fact that certain evidence is inadmissible in a federal trial does not render evidence obtained in the same manner inadmissible in state criminal proceedings.

Petitioner has attempted to distinguish the *Wolf* case from the instant proceeding on the ground that we are not concerned here with rules governing the admissibilty of evidence. On the contrary, we are concerned with nothing else. The crux of this entire case is the question of whether certain recorded telephone conversations were properly received in evidence in a criminal trial in a state court. The Court in the *Wolf* case stated the issue that was decided there in a manner which precisely phrases the question which must here be resolved, as follows:

> "The precise question for consideration is this: Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States . . ."[12]

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[11] *Wolf v. People*, 117 Colo. 279, 187 P. 2d 926 (1947).
[12] 338 U. S. at pp. 25, 26.

The question was of course answered in the negative. If anything, the petitioner in the *Wolf* case presented a stronger argument for reversal than that which is raised here. There the evidence in question was obtained in violation of both the Colorado Constitution and, through the application of the Fourteenth Amendment, the Constitution of the United States. Here the most that can be said is that a federal statute was violated. To uphold the admissibility of the evidence used in the *Wolf* case and then exclude that which was introduced here would certainly be inconsistent.

Much of petitioner's argument for reversal is based upon a reliance on *Weiss v. United States*, *supra*. It is urged as authority for the proposition that evidence obtained by intercepting telephone conversations is inadmissible in state as well as federal trials. We readily concede that the decision extends the application of the Federal Communications Act to intrastate messages, but it does not by any means follow that the Act prohibits the use of such evidence in a trial in a state court, involving matters of state law only. In the *Weiss* case, this Court reviewed the action of a *federal* district court. There was presented no question concerning the admissibility of evidence in a *state* trial. The only question before the Court was whether a federal trial court properly received evidence which was obtained by the interception of intrastate telephone communications. This case set forth the federal rule, but it is not authority upon the admissibility of evidence in state courts.

This Court has not yet written an opinion in which

it considered the effect of the Federal Communications Act upon the admissibility of evidence in a state court. However, the question has been presented to state courts many times, and without exception the admissibility of the evidence was sustained. Several of these cases were decided without reference to the Federal Communications Act, but in the vast majority the courts rejected arguments almost identical to that which is raised here. Several were approved by this Court by denial of certiorari, *one by direct affirmance*. It is recognized that a denial of certiorari is not necessarily an indication of this Court's unequivocal approval of the opinion below, and that, as the court of last resort for the entire nation, it is not always bound by the decisions of inferior courts. But it is respectfully submitted that when a particular question has been presented many times before, to the highest courts of various states, with the result inevitably the same, the decisions of the state courts are most authoritative.

The first such case, *People v. McDonald*, 165 N. Y. S. 41 (1917), was used as an authority for this Court's decision in the *Olmstead* case.[13] Although it was decided before the passage of the Federal Communications Act, there was in existence a somewhat similar New York penal statute designed to insure the privacy of telephone conversations. In violation of this statute, police tapped the telephone wire leading into the defendant's home and listened to a number of conversations to which he was a party. The defendant was convicted on the basis of the evi-

[13] 277 U. S. at p. 469.

dence obtained in this manner, and on appeal its admissibility was upheld.

There are several more recent decisions, both civil and criminal, in which evidence obtained by intercepting telephone messages was held admissible without reference to the Federal Communications Act. *People v. Pustau*, 103 P. 2d 224 (Cal. App. 1940); *State v. Raasch*, 201 Minn. 158, 275 N. W. 620 (1937); *Young v. Young*, 56 R. I. 401, 185 A. 901 (1936). It has also been held that such evidence is competent in a grand jury investigation. *Ex parte McDonough*, 68 P. 2d 1020 (Cal. App. 1937). In each of the criminal cases, the accused was the "sender" of the intercepted message.

In *People v. Kelley*, 22 Cal. 2d 169, 137 P. 2d 1 (1943), appeal dism. 320 U. S. 715, the Supreme Court of California sustained the admissibility of evidence obtained by the interception of telephone messages over the objection that its admission violated not only the Federal Communications Act, but also the Fourteenth Amendment to the Constitution of the United States. There the police entered the defendant's apartment, answered his telephone, and listened to his callers place bets on horse races. Although the defendant was not the sender of the messages, the case is pertinent here because of its adherence to the doctrine that a state court should not be required to make a collateral investigation of the source of competent evidence offered by the prosecution.[14]

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[14] See also *People v. Vertlieb*, 22 Cal. 2d 193, 137 P. 2d 437 (1943); *People v. Onofrio*, 151 P. 2d 158 (Cal. App. 1944). These were decided on the basis of the *Kelley* case and arose from substantially similar facts.

Another precedent appropriate here is *Hubin v. State*, 180 Md. 279, 23 A. 2d 706 (1942), cert. den. *sub nom. Neal v. Maryland*, 316 U. S. 680. Petitioner asserts that this decision presents facts distinguishable from the instant proceeding in that the defendant was not the sender of the intercepted messages. It is impossible to determine from a reading of the Court's statement of the facts whether this is true or not, but in view of the principle enunciated therein, this is immaterial. The Court simply held that the Federal Communications Act has no effect upon the admissibility of evidence in a state court. After summarizing the decision in *Weiss v. United States*, the Court made the following statement:

> ". . . However, in view of the decision in the Olmstead case, we hold that evidence procured by wire tapping is not prohibited in State Courts, either by the Federal Constitution or by the Federal Communications Act. . . ."[15]

Despite any quibble that might be raised about the applicability of the foregoing cases, there are others which cannot be distinguished from this proceeding. In each of these cases it was squarely held that Section 605 of the Federal Communications Act does not prohibit, in a trial in a state court, the admission of evidence obtained by intercepting telephone messages.[16] In each of these cases the de-

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[15] 23 A. 2d at p. 709.

[16] *State v. Steadman*, 216 S. C. 579, 59 S. E. 2d 168 (1950), cert. den. 340 U. S. 850; *People v. Stemmer*, 298 N. Y. 728, 83 N. E. 2d 141 (1948), affd. *Stemmer v. New York*, 336 U. S. 963; *People v. Channell*, 236 P. 2d 654 (Cal. App. 1951); *Harlem Check Cashing Corp. v. Bell*, 296 N. Y. 15, 68 N. E. 2d 854 (1946); *Rowan v. State*, 175 Md. 547, 3 A. 2d 753 (1939); *Hitzelberger v. State*, 174 Md. 152, 197 A. 605 (1938). See also *Black v. Impelliterri*, 111 N. Y. S. 2d 402 (1952).

fendant was the sender of the communications. It is true that the *Rowan* and *Hitzelberger* cases antedated this Court's decision in the *Weiss* case, and therefore any statements to the effect that the Act regulates only the interception and divulgence of interstate messages are now overruled. However, the final decision in each case was reached independently of any such dictum, and as regards the effect of the Act on the admissibility of evidence in state courts, the decisions remain unaffected by the *Weiss* case.

Thus in sustaining the admissibility of the recorded telephone conversations in question, the Court of Criminal Appeals merely held in accordance with a long line of decisions which unanimously authorized its action.[17]

Much of the petitioner's argument for reversal is based upon the concept of the supremacy of an act of Congress over the laws of individual states. "It is contended that the Federal Communications Act, being a valid exercise of Congressional authority in an area in which Congress is authorized to legislate, is an expression of Congressional policy which supersedes local rules and must be given effect as the supreme law of the land. . . ."[18] In its proper sphere, an act of Congress of course supersedes the laws of a state. However, the Federal Communications Act does not undertake to regulate the admission of evidence in state courts.

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[17] Although it does not appear in the opinion, the Court of Criminal Appeals rejected a similar contention last year. This Court denied certiorari. *Scholl v. State*, 235 S. W. 2d 639 (Tex. Crim. 1951), cert. den 342 U. S. 834.

[18] Petition for certiorari, pp. 27, 28.

Reliance is placed upon decisions in which it was held that a right of action derived from a federal statute may be enforced in a state court.[19] While it is true that Congress can compel a state court to enforce a federal statute, it does not follow that it can thereby prescribe the manner in which the local courts must enforce its legislation. It is well established that Congress may regulate intrastate transactions in order to remove a burden from interstate commerce. *Houston E. & W. T. R. Co. v. United States*, 234 U. S. 342 (1914). It is equally well established that a state is free to regulate the proceedings in its courts in accordance with its own conception of social policy and justice, being limited only by due process. *Carter v. Illinois*, 329 U. S. 173, 175 (1946); *Avery v. Alabama*, 308 U. S. 444, 446 (1940); *Brown v. Mississippi*, 297 U. S. 278 (1936); *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934).

The Fourteenth Amendment provides the only basis for federal supervision of state criminal proceedings. Congress has no such supervisory authority. As this Court, in *McNabb v. United States*, 318 U. S. 332, 340 (1943), pointed out:

> ". . . For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' *Hebert v. Louisiana*, 272 U. S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the

[19] *Testa v. Katt*, 330 U. S. 386 (1947); *Claflin v. Houseman*, 93 U. S. 130 (1876); *Bowles v. Angelo*, 188 S. W. 2d 691 (Tex. Civ. App. 1945).

federal courts is not confined to ascertainment of Constitutional validity. . . ."

Even due process leaves much room for the freedom which the Constitution reserved to the states for the exercise of their police power and for their control over the procedure to be followed in the criminal proceedings held in their respective courts. The Fourteenth Amendment has not been interpreted so as to impose uniform procedures upon the courts of the individual states, and it recognizes that, as between federal and state courts, there are many procedural differences. *Bute v. Illinois*, 333 U. S. 640, 649 (1948); *Slansky v. State*, 192 Md. 94, 63 A. 2d 599 (1949). It "was not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial." *Avery v. Alabama, supra*, pp. 446, 447.

"In the *State Courts*, the legislation of each jurisdiction is supreme, except so far as limited by the Federal Constitution. Consequently, rules of Evidence in the State Courts are not controlled in any manner by the Federal statutory legislation, although they are subject to such limitations as may be prescribed in any Federal constitutional provisions applicable to State legislation." 1 Wigmore on Evidence (3rd ed.) 204, 205, § 6e. Here, of course, we are not concerned with any constitutional question, but only with the application of a federal statute which has been held to provide a rule of evidence under certain circumstances, and therefore it is immaterial whether the nature of the right thus created is substantive or procedural.

Under the authority of its inherent police power, the State of Texas has undertaken to regulate extensively its criminal prosecutions and the admissibility of evidence therein. A federal statute must be presumed to affect only federal jurisdiction and not to supersede a state's exercise of police power, unless there is a readily apparent manifestation of Congressional intent that it should operate thus.[20] In the absence of a clear and unequivocal expression to the contrary, it is not to be presumed that Congress, by the passage of the Federal Communications Act, intended to circumscribe the power of a state to control the admissibility of evidence in trials in its own courts.

Section 605 of the Act was designed to penalize wire tapping and other similar activities which interfere with the use of the telephone, telegraph, and radio. It has become a rule of evidence only by judicial implication. While this policy is perhaps meritorious insofar as it applies to federal courts, it would be an unprecedented invasion of the powers inherently reserved to the states if it were extended to state criminal proceedings. Congress, of course, has the power to prescribe what evidence is to be received in the Courts of the United States, *Tot v. United States*, 319 U. S. 463, 467 (1943), but also "it is within the established power of the state to prescribe the evidence which is to be received in the courts of its own government." *Adams v. New York*, 192 U. S. 585, 599 (1904).

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[20] *Townsend v. Yeomans*, 301 U. S. 441, 454 (1937); *Atchison, Topeka & Santa Fe R. Co. v. Railroad Commission of California*, 283 U. S. 380, 392, 393 (1931); *Savage v. Jones*, 225 U. S. 501, 533 (1912).

Petitioner was tried in a Texas Court for a violation of Texas law. Certain recorded telephone conversations were used in evidence at his trial. This is not repugnant to the Constitution of the United States, nor is it a violation of State law. Although similar evidence might have been inadmissible in a federal court, it does not follow that the same holds true in a state court. On the contrary, such evidence is admissible in the absence of a state law which forbids it, and there is no such prohibition imposed by Texas law. Therefore it is respectfully submitted that the evidence in question was properly received.

POINT TWO

The recordings were obtained without an "interception" of the telephone messages.

STATEMENT

It has been noted above that Jarrett, in cooperation with local peace officers, made the telephone calls from the office of the Sheriff of Dallas County. Schwartz admitted that he had talked to Jarrett, and moreover he testified that he had suspected all along that their conversations were being recorded (R. 173). However, at the trial the two presented conflicting testimony as to what had actually been said, so the State on rebuttal introduced the recordings in order to corroborate the testimony of Jarrett.

These records were made in the Sheriff's office by means of a "pick-up." (R. 105). They were

transcribed by J. E. Sellers, who for some fifteen years had been engaged in the business of making recordings and transcriptions. This was accomplished through the use of an induction coil, a sensitive receiving apparatus similar in many respects to an ordinary hearing aid. It was placed in close proximity to the telephone used by Jarrett, and through it Sellers was able to record not only Jarrett's voice, but also the voice of Schwartz as it was heard through the receiver. Sellers, with the knowledge and consent of Jarrett, listened to these conversations as they were being recorded (R. 212-215).

In its opposition to petitioner's first amended motion for a new trial, the State emphatically denied that these recordings were made by means of tapping telephone wires (R. 26). It attached to its controverting motion an affidavit in which Sellers minutely described the manner in which the telephone conversations had been transcribed (R. 28).[21] There was never any physical connection between the listening apparatus and the telephone, and no wires were "tapped." It is upon the basis of these facts that respondent takes the position that there was no "interception" of the telephone messages within the contemplation of Section 605 of the Federal Communications Act.

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[21] Through an error in the preparation of the transcript, the words "There was at no time any connection made" were omitted from the last line of this affidavit. A certificate executed by the District Clerk, containing a true and authenticated copy of the affidavit has been filed in the office of the Clerk of this Court, and it has been reproduced in the appendix to this brief, pages 30, 31.

ARGUMENT AND AUTHORITIES

In taking this position, respondent is not unaware of Judge Learned Hand's opinion in *United States v. Polakoff*, 112 F. 2d 888 (2d Cir. 1940), 134 A. L. R. 607, cert. den. 311 U. S. 653. However, this is but one of several cases decided by the lower federal courts on the basis of facts essentially the same as those reflected in the record of the instant proceeding. These decisions are in conflict, and this is a question upon which the Supreme Court of the United States has not yet written an opinion. Therefore it is logical that it too should be decided in this case.

In the *Polakoff* case, the defendant was accused of a conspiracy to obstruct justice. For a sum of money, he had agreed to intervene in the criminal prosecution of one Kafton, by the exercise of personal influence with an Assistant United States District Attorney. In cooperation with the Federal Bureau of Investigation, Kafton made several telephone calls to the defendant, and their conversations were overheard and recorded on a telephone extension. The transcriptions were introduced in evidence at the defendant's trial, and the conviction was reversed on the ground that the evidence was inadmissible. Not only was it held that the messages were "intercepted," but also that the interceptors could not reveal what they had overheard without the consent of both parties to the conversations.[22]

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[22] Companion case to the same effect: *United States v. Fallon*, 112 F. 2d 894 (2d Cir. 1940).

Thus we have a synopsis of the case upon which petitioner chiefly relies. Except for the precise manner in which the messages were overheard—there over an extension telephone and here by the use of an induction coil—it is virtually indistinguishable from the case at bar. There are other authorities which might also be cited in support of the principles enunciated therein.[23] However, the question is still an open one as far as this Court is concerned, therefore it is earnestly and respectfully submitted that the decision in the *Polakoff* case is erroneous, and that the dissenting opinion therein represents the correct approach to the problem. Other courts of equal dignity have rejected its doctrine, and this Court should not adopt it.

In *United States v. Guller*, 101 F. Supp. 176 (E. D. Pa. 1951), the accused was convicted on the basis of evidence obtained by a federal narcotics agent, who, on an extension telephone, overheard conversations between the accused and an informer. It was held that the term "interception" contemplates the interjection of an independent receiving device between the lips of the sender and the ear of the receiver, and that therefore no interception had occurred. The same result was reached in *State v. Steadman*, 216 S. C. 579; 59 S. E. 2d 168 (1950), cert. den. 340 U. S. 850, in which the messages were recorded by means of a device attached to the telephone instrument through which the informer talked

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[23] *United States v. Coplon*, 185 F. 2d 629 (2d Cir. 1950), cert. den. 72 S. Ct. 362; *Reitmeister v. Reitmeister*, 162 F. 2d 691 (2d Cir. 1947); *United States v. Gruber*, 123 F. 2d 307 (2d Cir. 1941).

to the defendant—almost identical to the method employed here.

In *United States v. Yee Ping Jong*, 26 F. Supp. 69 (W. D. Pa. 1939), the recorded telephone messages introduced in evidence were obtained by means of a device attached to the *wire* inside the house from which an informer made his calls to the defendant. The recordings were held admissible on the ground that there had been no "interception," within the contemplation of Section 605 of the Federal Communications Act. On page 70, the Court made the following statement:

> "The manner in which the conversation in question was recorded does not seem to present such an interception as is contemplated by the quoted statute. Webster's New International Dictionary defines the verb 'intercept' in part as follows: 'To take or seize by the way, or before arrival at the destined place; * * *.' *The call to the defendant was made by Agent White, and the conversation between his interpreter and the defendant was not obtained by a 'tapping of the wire' between the locality of call and the locality of answer by an unauthorized person, but was, in effect, a mere recording of the conversation at one end of the line by one of the participants.* It differed only in the method of recording from a transcription of a telephone conversation made by a participant. We are of the opinion that the admission of the record in evidence was not error." (Emphasis supplied).

United States v. Lewis, 87 F. Supp. 970 (D. D. C. 1950), rev. on other grds. *Billeci v. United States*, 184 F. 2d 394 (D. C. Cir. 1950), presents substan-

tially the same facts as those before the Court in this case. Some of the messages were recorded, and this was accomplished by a mechanical device attached to or placed in proximity to the telephone. Others were transcribed in shorthand by a stenographer listening on an extension. *"It is important to observe that in each instance one of the parties to the conversation knew it was being recorded and either requested that this be done or acquiesced in that course."*[24] It was held that no interception had occurred .On page 973, Judge Holtzoff stated his holding thus:

> ". ... I hold that it is not a violation of the statute if the conversation is recorded, manually, mechanically, or electrically, at the instance of or with the consent or knowing acquiescence of one of the parties to it."

That Court was squarely confronted with the question of whether to follow the rule of the *Polakoff* case or to adhere to that expressed in *United States v. Yee Ping Jong*. After a careful consideration of each case, it chose to apply the doctrine of the latter.

The *Lewis* case was reversed on other grounds, but insofar as we are concerned with it here, the decision remains unimpaired by reversal. *Billeci v. United States*, 184 F. 2d 394 (D. C. Cir. 1950). The problem discussed above apparently was not presented to the appellate court, but it was held there that a fact situation similar to that of *People v. Kelley, supra*, i.e., where officers enter the defend-

[24] 87 F. Supp. at p. 972.

ant's premises and answer telephone calls intended for the defendant, does not constitute an "interception."

This Court too has defined the term "interception," as it is used in Section 605 of the Federal Communications Act. *Goldman v. United States*, 316 U. S. 129 (1942). There government agents place a detectaphone against a partition wall in order to enable a stenographer to transcribe what the defendant, in the next room, said in a telephone conversation. Although the two cases present somewhat different facts, this Court gave the term "interception" a meaning which cannot be reconciled with the opinion in the *Polakoff* case, as follows:

> "What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission. Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication within the terms of the Act until they are handed to an agent of the telegraph company. Words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of the section. Letters deposited in the Post Office are protected from examination by federal statute, but it could not rightly be claimed that the office carbon of such letter, or indeed the letter itself before it has left the office of the sender, comes within the protection of the statute. *The same view of the scope of the Communications Act follows from the natural meaning of the term 'intercept.' As has rightly been held, this word indicates the*

taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the same moment, it comes into the possession of the intended receiver. The listening in the next room to the words of Shulman as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room."[25] (Emphasis supplied).

In *Reitmeister v. Reitmeister*, 162 F. 2d 691, 694 (2d Cir. 1947), Judge Hand himself conceded that his opinion in the *Polakoff* case might have been overruled by this Court's decision in the *Goldman* case. One of his colleagues, in a concurring opinion, stated explicitly that it had been so overruled. It is therefore submitted that the decision of the Circuit Court of Appeals in *United States v. Polakoff* has not survived that of the Supreme Court of the United States in *Goldman v. United States*, and that here it should be expressly overruled.

The term "wire tapping" connotes the use of an apparatus surreptitiously attached to the telephone line for the purpose of overhearing a telephone conversation without the knowledge of either party to it.[26] "Interception" contemplates the taking or seizure of something by the way of or before arrival at

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[25] 316 U. S. at pp. 133, 134.

[26] *United States v. Lewis, supra*, p. 972.

its expected destination.[27] As applied to a telephone message, the word implies that *neither* party consented that it be overheard.[28]

In the case at bar, the conversations were overheard and recorded at the terminus of the telephone line. This was accomplished by the use of an induction coil which was not physically connected to either wire or receiver. The recordings were made with the acquiescence and cooperation of one of the parties to the conversations, and apparently with the knowledge of the other. Petitioner accepted some twelve to fifteen telephone calls from Jarrett and conversed with him at length in each, despite the fact that all along he harbored a suspicion that their conversations were being overheard and perhaps recorded. Thus the communications were not "intercepted," and there were no telephone wires "tapped."

The trend of the law in recent years has been in favor of the admissibility of evidence and against rigid rules of incompetence. Only last summer this Court sustained the admission of evidence obtained by an informer who recorded his conversation with the defendant by means of a small device concealed on his person. *On Lee v. United States*, 72 S. Ct. 967 (1952). This was upheld over the objection of the Federal Communications Act as a bar.

The use of the telephone is not a guarantee of the right of privacy. Evidence obtained by eavesdropping, in the form of disguises, binoculars, and the detectaphone—all clear violations of the right of privacy—is perfectly admissible against the person

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[27] *Goldman v. United States, supra*, p. 134.
[28] *United States v. Lewis, supra*, p. 973.

under such surveillance. There can be no common sense distinction between the means employed to obtain the evidence in question here and any other form of eavesdropping done without unlawful trespass. If petitioner's theory of the case is adopted, the courts will be forced to reject the best evidence, contrary to all current trends in the law. One who wilfully violates the laws of his state should not be allowed to render himself virtually immune from local prosecution by the interposition of a federal statute which was never originally designed as a rule of evidence.

CONCLUSION

It is respectfully submitted that this case should be affirmed.

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November, 1952.

APPENDIX

THE FEDERAL COMMUNICATIONS ACT

47 U.S.C.A. § 605

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels or transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein

contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

CERTIFICATE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

I, Bill Shaw, Clerk of the Criminal District Courts of Dallas County, Texas, do hereby certify that my office made an error in copying the transcript of the proceedings in Cause No. 7768-AB, Styled *The State of Texas vs. Thomas Schwartz*, in the Criminal District Court No. 2 of Dallas County, Texas, which was prepared by this office and forwarded to the Court of Criminal Appeals at Austin. This transcript contains a typographical error in State's Exhibit "A" (Tr. 33), and the printed Transcript of Record filed in the Supreme Court of the United States, Cause No. 41, styled *Thomas Schwartz, Petitioner, vs. The State of Texas*, contains the same typographical error in State's Exhibit "A"—Affidavit of J. E. Sellers (R. 28). The following is a true and correct copy of the original exhibit on file in the records of this case:

THE STATE OF TEXAS }
COUNTY OF DALLAS }

I, J. E. SELLERS, am one and the same person who testified in regard to the State's Exhibit Nos. 4, 5, 6, 7, 8 and 9, in Cause No. 7768-A/B, The State

of Texas vs. Thomas Schwartz, in the Criminal District Court No. 2, Dallas County, Texas, January Term, 1951. The State's Exhibit Nos. 4, 5, 6, 7, 8 and 9 were recorded by me in the Dallas County Sheriff's Office. These recordings were made by the use of an induction coil connected to a recorder amplifier. The induction coil was held in proximity to the telephone. At the time of the making of these recordings I had ear phones on so that I fully know that these recordings are the true and same recordings as I heard the conversations through my ear phones as the recordings were being made. There was at no time any connection made with the telephone wires or any part thereof.

/s/ J. E. Sellers
J. E. SELLERS

SUBSCRIBED AND SWORN TO before me a Notary Public, by J. E. Sellers on this the 17th day of March, A. D. 1951.

/s/ Bobbie Smith
Notary Public in and for
Dallas County, Texas

State's Exhibit "A"

Given under my official Signature and Seal of Office, at Dallas, Dallas County, Texas on this the 10th day of October, A. D., 1952.

BILL SHAW,
District Clerk, Dallas
County, Texas

By BILLY G. BURDEN,
Deputy